

April 27, 2010 BZA Minutes

STAFFORDCOUNTY BOARD OF ZONING APPEALS MINUTES

April 27, 2010

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, April 27, 2010, was called to order with the determination of a quorum at 7:00 p.m. by Chairman Robert C. Gibbons in the Board of Supervisors Chambers. Mr. Gibbons introduced the Board members and staff and explained to the public present, the purpose, function and process of the Board of Zoning Appeals. He asked the members of the public who planned to speak at this meeting to please stand and raise their right hand, swearing or affirming to tell the truth.

Mr. Gibbons stated the Bylaws of this Board state the applicant would be allowed up to ten minutes to state their case, the other speakers would be allowed three minutes to testify, and the applicant would be allowed three minutes for rebuttal.

sent:

Ernest Ackermann, Ray Davis, Robert Gibbons, Larry Ingalls, Karl D. Larson and Heather Stefl

Members Absent:

Marty Hudson, Paul Ortiz and Steven Apicella

Staff Present:

Gail Roberts, Deputy County Attorney

Rachel Hudson, Zoning Administrator

Melody Musante, Senior Zoning Technician

Aisha Hamock, Recording Secretary

Mr. Gibbons: Are there any changes or additions to the advertised agenda?

Mrs. Musante: There are no changes.

Mr. Gibbons: Thank you ma'am. Before we hear the first case, does any Board member wish to make any declarations or statements concerning any cases to be heard before the board tonight?

DECLARATIONS OF DISQUALIFICATIONS

Mr. Ingalls: Mr. Chairman, in case A10-1/1000030 and case A10-2/1000064, those cases are represented by Mr. Clark Leming and over the years from time to time, the firm that I work for, Sullivan, Donahoe and Ingalls, has shared the same clients with Mr. Leming and his firm. Sullivan, Donahoe and Ingalls has not worked on this project with Mr. Leming and I do not personally represent Mr. Leming's firm or the applicant Chesapeake-Stafford & Associates, LLC., and I have not had any contact with Mr. Leming or his firm concerning any matters before this Board, except a telephone call confirming that I received his e-mail. In addition, a copy of the plat showing the sixty foot wide ingress egress easement for Venture Drive was included with the information submitted by the applicant. This plat was prepared in 1993 for a different

client than the applicant, who had not taken title of the subject property until 1997. Therefore, I am able to participate fairly, objectively and in the public interest of the cases before the board.

Mr. Gibbons: Thank you, anybody else? Okay, now we ask the secretary to read the first case please.

PUBLIC HEARINGS

1. **A10-1/1000030 - LEMING AND HEALY, P.C.** - Appeal of the Zoning Administrator's vesting determination dated January 14, 2010, regarding vesting of land use under the M-1, Light Industrial zoning district, Chesapeake-Stafford & Associates, LLC, Assessor's Parcel 38-83H, on Venture Drive in the Wyche Industrial Park. This parcel was zoned to B-3 on March 18, 2008.

Mrs. Musante: Case A10-1/1000030, applicant Leming and Healy, P.C., appeal of the Zoning Administrator's vesting determination dated January 14, 2010, regarding vesting of land use under the M-1, Light Industrial zoning district, Chesapeake-Stafford & Associates, LLC, Assessor's Parcel 38-83H, on Venture Drive in the Wyche Industrial Park. This parcel was zoned to B-3 on March 18, 2008. You received the application, the owners consent, determination dated January 14, 2010, appeal justification, exhibits A, B and C, assorted maps, vesting determination application dated October 8, 2009, request letter dated September 26, 2009 from Chesapeake-Stafford and Associates LLC., and exhibits provided by the applicant. I will now read the staff report from the Zoning Administrator. Applicant, Leming and Healy, on behalf of the owner Chesapeake-Stafford and Associates, LLC, is appealing a January 14, 2010 vesting determination by the Zoning Administrator with concurrence from the County Attorney. The parcel is 38-83H, located on Venture Drive in the Wyche Industrial Park. The parcel was rezoned by the Stafford County Board of Supervisors by ordinance 008-01, March 18, 2008, from M-1, Light Industrial to B-3, Office. Section 15.2-2307 of the Code of Virginia (1950), as amended, states "a landowner's right shall be deemed vested in a land-use and such vesting shall not be affected by a subsequent amendment to the zoning ordinance when the landowner (i) obtains or is the beneficiary of the significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses and diligent pursuit of the specific project in reliance of the significant affirmative governmental act". The owner's application for vesting requests included three exhibits for review; 1) a generic letter from Stafford County to Wyche Road Industrial Park owners that the 1990 final subdivision plat was recorded without signature of the Agent for the Board of Supervisors in the Office of the Clerk of the Circuit Court; 2) a letter from the Planning Director dated May 21, 2003 stating what must be completed prior to recordation of the subdivision plat and 3) a copy of an approved and recorded final division and dedication plat for tax map parcel 38-83D creating lots 8, 10, 11 and 17, lot 11 being the subject parcel, 83H. The Zoning Administrator with concurrence of the County Attorney determined this was not, however, in pursuit of a specific project, plan of development or specific use of the property and therefore, not vested for the M-1

zoning and the use must conform to the current zoning classification, which is B-3. The recorded subdivision plat dated February 19, 2004 was a "significant affirmative governmental act" that remains in effect and there have been substantial expenditures associated with erosion and sediment control design for the existing road and turnaround as well as engineering for the subject lot.

Mr. Gibbons: any questions for the staff? Okay, I will open the public hearing now, will the applicant please come forward.

Clark Leming: Good Evening Mr. Chairman and members of the Board of Zoning Appeals. My name is Clark Leming and I am here on behalf of the applicant. There are two appeals before you tonight, this one is, as staff indicated, a challenge. I request that you overturn the determination of the Zoning Administrator. The Zoning Administrator found that this particular property was not vested under the relevant code sections, which we're going to talk about in a minute. The second appeal is irrelevant, it's moot, in the event that you do agree that the property is vested. Vesting is one of the most complicated issues that come before members of the Board of Zoning Appeals. In fact, I'm not sure that there has been a vesting case here; I know Mr. Ingalls has heard some vesting cases but I think it's been awhile since we've heard a vesting case here. Vesting or property rights that permit an owner to continue to develop in accordance with a prior governmental approval, we're going to talk about that in this case, and in accordance with the zoning regulations at the time of the approval. Essentially, it comes down to reaching a certain point in the development process; the law says it's inequitable and unlawful to pull the zoning rug out from under the property owner. Until 1998 vesting was determined by the courts, there was a common law test that was used. In 1998, the Virginia General Assembly codified a vesting test and one of the handouts you have before you is that code section and we will talk about 15.2-2307. We will come back to that in just a moment. The important facts with regard to this particular property are these first, for general background, the property was rezoned in 1975 to M-1, that is not ultimately a critical fact as far as vesting is concerned but helpful background. Here's what's more important and critical to the vesting analysis, in 1989 there was a preliminary subdivision plan approved for the Wyche Industrial Park. It was called the Wyche Industrial Park in our final plat recorded for lots 8, 9, 10, 11, 17 and 18. Lot 11 is the subject of the determination that we are challenging tonight. All of the subdivision plats from the preliminary plan, all of them referencing the Wyche Industrial Park. There was a construction plan for the Wyche Road Industrial Park labeled that, and you have that with you. Actually, you have the revision of that. A construction plan approved in 1989. There was the revised construction plan approved in 1998 for Wyche Road Industrial Park. CSA, the applicant here tonight, Chesapeake-Stafford Associates, who is represented by Ms. Chesa Blanton, purchased three lots in 1997. Of the eleven lots, there are five that are completely built out, that actually have structures on them if you have been back there. In the aerial, you will see four buildings; there is one that is not shown on aerial so there is the fifth one that has actually been built out. That was one of the lots that Chesapeake Stafford Associates had purchased back in 1997. Another building has been placed on another lot that they purchased on the same date. In 2004, as was

indicated in the staff presentation there were final plats recorded for 8, 10 and 11. The important thing to recognize about the vesting analysis tonight is that under state law we have a three-part test and it is set forth in the statute that I gave you, I think it has also been read to you as well. The first part of the test goes to whether there was a significant affirmative governmental act, in this case the County agrees that there was one and it was the final subdivision plat and that is item number six that is listed at the second paragraph of the statute itself. "The governing body or its designated agent has approved the final subdivision plat, site plan or plan of development for the land owners property", this was a final subdivision plat that was recorded and the County agrees with that. There is also no issue regarding the second prong of the test, the reliance in good faith on the significant affirmative governmental act, obviously, if they moved forward when they had the plats recorded they sold them, they built on two of them. This concerns the remaining lot that has not been built upon that this particular entity owns. There are others within the industrial park. And three, the third part of the test incurs extensive obligations or substantial expenses as you heard in the staff report, those expenses have occurred here. So what does this turn on, what is the analysis about? It comes down to the language partially contained at prong number one, "the land owner obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project", so the question is, is this final subdivision plan a specific project? In our view it is, it is the Wyche Industrial Park. That is historically what it has been, that is how it's been built out, there're only industrial uses in five of them actually on the ground. Now it goes on to say in the next section, it will actually list the things that do constitute significant affirmative governmental acts. There are six of them listed here, the seventh one coming this legislative session. "For purposes of this section, without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project", so there is the answer to your question, if you do one of the six things with a couple of exceptions we will talk about, it's a specific project, it defines itself. So six, the recordation of a final subdivision plat is on the face of the statute a specific project and therefore, meets the issue that is defined in the first prong of the test in the first paragraph. Now contrast to what's going on with number six, the final subdivision plat and the other things listed in that section with items number (i) and (ii). (i) The governing body has accepted proffers or proffered conditions, which specify use; it is a little different than what you have listed down for proffered 3, 4, 5 and 6 in the list here. The second one, the governing body has approved an application for rezoning for a specific density, that kind of language is repeated, specific use, specific project. That does not appear for items 3, 4, 5 and 6, so when you read those as the statute is written, "for purposes of this section without limitation, the following are deemed to be significant affirmative governmental acts with allowing development of a specific project". Go down to number six, "the governing body or its designated agent has approved a final subdivision plat"; by definition a final subdivision plat is a specific project. Now that makes all the sense in the world when you get to that point in the development, when you get to the point of recording the final subdivision plat what can it be for but for specific project or a specific use. In this case, historically, you have even more to go on because the preliminary plan, the construction plan, the final plats that have gone to record have all referenced the Wyche Road Industrial Park. So, that is a specific project in mind and it is built out that way. There is

nothing that has been put on any of these lots that is inconsistent with what it is that was approved. You don't have any houses out there, you don't have any other industrial uses, and they are all uses that you would associate with an industrial park. So, this is in my view actually a pretty easy call because not only do you have a property that complies on its face with the statute and the specific project, historically, everything that has been done is consistent with that original specific project Wyche Road Industrial Park. That is what it's been dubbed since 1989, the preliminary plan and everything else that has followed after that. So, in our view, that absolutely meets the purpose and the intent of the statute and is clearly vested under 15.2-2307. The other points that I would like to be sure that I covered, the applicant has spent about \$50,000 between engineering and bonds have been posted on property, they have done these improvements. That relates to prong three of the test, which the County does not quibble with, they say those are substantial expenses and they do qualify for substantial expenses under Virginia case law. Under Virginia case law, we really only have one decision that is at all relevant to this, if you want to talk about this I will but I see the red light is flashing. I would like to say for the record I do not think that ten minutes is sufficient time to explain a vesting case but I've done my best and they are your rules.

Mr. Gibbons: Thank you, any questions for Mr. Leming?

Mr. Ackermann: Well I have a question, from my hearing of what you are saying, please correct me if I had the wrong impression, so you're saying that because this was designated an industrial park in 1989, all this refers back to that and that because its designated such, and we have had all the development going back to the designation of being an industrial park?

Mr. Leming: Not exactly.

Mr. Ackermann: Okay, what I was hearing was that we can change that but if maybe you could elucidate that.

Mr. Leming: A significant governmental act in this case is not the preliminary subdivision plan in our view; it's the final subdivision plat that was recorded by the applicant in 2004 for the lots they purchased. What the statute requires is that, it's listed right here and everyone concedes that in a final subdivision plat, the county has conceded that this final subdivision plat is a significant affirmative governmental act. The thing the County says is, wait a minute it wasn't for a specific project that is the only language. The other language thrown in there was not part of the statute; it wasn't for a specific project. Why is it for a specific project? There are two reasons, 1) if that's what the statute says, it says "the following are deemed to be significant affirmative governmental acts allowing the development of a specific project", there is the language. And then you are down to number six in the final plat is actually listed. Now that's all you need to decide the case on the face of the statute alone but what you have in addition to that is history that is totally consistent with the industrial park. That is what was planned as, that is how it's developed; if you go down the road right now and look at it that is what you want to see there.

So, how anyone can say that that's not a specific project that was intended is beyond me. It's developed exactly as it was originally envisioned what was set up and subdivided; that goes back to the preliminary subdivision plan because that was the first time that the term "the Wyche Road Industrial Park" is used and was set up for that purpose.

Mr. Ackermann: So how could, just in your opinion, how could the zoning department have Stafford County say some of those plats are B-3 instead of M-1?

Mr. Leming: That is why vesting is a complicated issue. What the law says is that if a property is vested they can proceed in accordance with the zoning regulations that were in effect at the time of the vesting so we back up to 2004, which is the date of the final subdivision plat that was recorded. That is a significant affirmative governmental act. What has happened is that the government here has come along and changed the zoning for this entire area and said this is no longer M-1, you can't do what you could've done in an M-1 district, that we've made it a B-3 district so you can't do anything except what is permitted in the B-3 district, which is general office and light commercial. Now what the statute is designed for is to say, in which cases that does not apply. In cases where there is a significant affirmative governmental act, there has been reliance for specific projects, which is what we just talked about, and in prong three there have been substantial expenses, which they agree there have been. You meet those conditions, you are vested and the new zoning ordinance does not apply to you. You can continue to proceed in accordance with the original zoning and the regulations that were in effect at the time the significant affirmative governmental act was adopted by the government. So it is a balancing test, at what point does the government get to say here is what you can do with your land and at what point does the landowner get to say but I got to this point, you can't say I can't proceed with my project, it's too late.

Mr. Ackermann: So, do you think there might be some thoughts that this could be changed to B-3? The thing we have to think about is what is special about the situation compared to other situations?

Mr. Leming: Yes, that is possible. I have not focused on the other lots and tried to and apply a different vesting analysis to them but there are other lots, if you look at your plat, the road if you've been out there actually comes to stopping point at that point when it comes to Venture Drive. There is a block where the road stops, there are four lots beyond that point and based on my information, I don't believe that those lots have gone to the final plat. There is no final subdivision plat recorded for those lots. The significant affirmative governmental act that we are using for Chesapeake Stafford Associates could not be utilized for a lot out there where there have been no final plat recorded, unless there was another significant affirmative governmental act and another paradigm that meets the three prongs of the test. Those lots would not be vested. This particular lot we say is vested because they did the final plat, they built on the other lots, they did expend money and they relied on subdivision plat. So there could be others that are not.

Mr. Ackermann: Okay, Thank you.

Dr. Larson: Mr. Chairman, Clark, there is a memo that's part of the application package, the subject is Wyche Road Industrial Park from William C. Shelley, Director of Planning. Do you know what the date on that memo is?

Mr. Leming: If it doesn't say on it, I'm not sure we know anything.

Dr. Larson: There is no date on the memo that I have and I am just curious.

Mr. Gibbons: There is no signature either.

Dr. Larson: There is no signature either, that's correct.

Mr. Leming: It is just the memo informing the owner of the subdivision plat is not properly recorded.

Dr. Larson: Yes.

Mr. Leming: That was corrected in 2004 but the letter went out saying that was not properly recorded and then to Chesapeake Stafford Associates, in response to a letter from Mr. Harvey, which says what you have to do to go to final plat and they did that. They went to final plat with signatures in 2004, and that is a significant governmental act, not what had been attempted to be recorded before without signatures.

Dr. Larson: I was curious if we had the date available on that?

Mr. Leming: It would be something, Bill retired in about 2000. It would have to be before 2000.

Mr. Ackermann: It has a 703 area code and I don't know when it switched over.

Dr. Larson: I don't have any further questions so I guess I'll pass it along for now.

Mrs. Stefl: You stated that they purchased the property in 1997.

Mr. Leming: Yes.

Mrs. Stefl: But they just now, almost thirteen years later, are just now acting upon this property? In the sense that they outlayed this \$50,000 that he stated in sediment and things like that. So why such a delay in their not wanting to build prior to when they had the opportunity at M-1, why now that it's been B-3.

Mr. Leming: Keep in mind, the ordinance changed in 2008, so a lot of it has to do with market. They purchased in 1997. Why don't you come up here Chesa, do you recall when the first lot was sold? There were three lots they purchased.

Ms. Blanton: Hi my name is Chesa Blanton, I live at 5715 10th Rd. N. Apartment 7, that's in Arlington, VA 22205. I believe the first lot we sold was in 2004 after the final plat was approved.

Mr. Leming: It would have to be after the final plat was approved because before that period of time it would have been invalid to convey the lot or do anything with it. A number of property owners purchase property as an investment, if it is their desire to sell the property then obviously they have to wait till they have a buyer. For the purposes of vesting, what counts is what's been done to date and in one of the original vesting cases out of this jurisdiction, Mr. Ingalls may remember, we had a subdivision called, I can't remember what it is called, a subdivision that was owned in the 1980's and some things happened upfront, just the opposite of this paradigm. The things that happened upfront for the preliminary subdivision plan, construction plan then nothing happened for a substantial period of time. Both the BZA, this body, and the Circuit Court agreed that the property was vested because of what had happened at that point in time. So gaps in activity does not negate vested rights. It depends on what the nature of the incident that occurred along the way are and whether or not they are significant milestones in the development process. There is no time limit that the statute indicates for such acts to occur. So in this case we go forward to 2004 when they corrected the subdivision plat that had been erroneously recorded before. When they bought the property they thought they had final subdivision plat but they did not. The county let them know that, they corrected the plans and it occurred before 2004. I would say starting in 2003, the plat recorded in 2004 and then they started to market and sell the lots. They had three of them and two of them were built out and this is the remaining lot.

Mrs. Stefl: Okay, thank you.

Mr. Ingalls: I guess I'm struggling with a few things like always. This old three-legged stool that we talk about vesting rights, it is a difficult case sometimes. It appears to me from the county's memo that they have given you two legs right away.

Mr. Leming: Yes.

Mr. Ingalls: They said there are three tests for vesting and they've given you two of them right away. They gave you number one, significant affirmative governmental act. They say you've done that, the project has done that.

Mr. Leming: That was part of number one.

Mr. Ingalls: They say number three, they indicated that you have put in substantial expenses. The only one that remains is number two in the code.

Mr. Leming: Well, the county's determination was based on the first prong of the test, they concede as you indicate, there is a significant affirmative governmental act that the final subdivision plat constitutes such. What they disagree with us on is that it is for a specific project; that part of that first prong. The second prong is not contested here, the second prong is the one that there is the least written about because in most cases it is so patently obvious. The second prong of the test simply says "relies in good faith on the significant affirmative governmental act", well relies in good faith, what do you do in good faith? You proceed with the project, you build out the infrastructure, you sell the lots and relying on the significant affirmative governmental act because you could not do those things if there had not been one. It is a significant affirmative governmental act that makes these things possible. There is no allegation of any fraud here.

Mr. Ingalls: Is the question then, it appears the County has almost said the project is lot?

Mr. Leming: The County says it's not a specific project.

Mr. Ingalls: That is not the project. The project is Wyche Industrial Park, that is the project that we are talking about.

Mr. Leming: That's right.

Mr. Ingalls: I don't know why you say that the preliminary plan was not a significant governmental act.

Mr. Leming: Well, It is also that in this particular case we have an even more recent significant affirmative governmental act. I have theoretically three, I have the original zoning but there is no evidence saying what was to be on the ground at that point. Only when you get to the preliminary subdivision plan do you have a vision of what it's supposed to be. So you're correct and we would have analyzed this and set up the paradigm under the 1989 preliminary subdivision plan but we used the more recent one because that is the one where the expenditures had been made, we have the evidence of the expenditures, I think that at least the implicit evidence of the reliance. It is a cleaner, in my view, it is a cleaner analysis because we have the documentation of the other prong of the test.

Mr. Ingalls: I think you have possibly four. He has a rezoning, the preliminary plat approval, the construction plan approval and the final plat.

Mr. Leming: The construction plan is another potential saga, correct?

Mr. Ingalls: You have another possible one. I thought I read that there were four lots purchased originally?

Mr. Leming: There were, the road moved in some of the plans and that eliminated one of the lots.

Mr. Ingalls: Okay, so the three lots you have, your client, took them in... the new subdivision plat which the county approved in 2004, right after that they must have sold Lot ten (10) I assume?

Mr. Leming: Yes.

Mr. Ingalls: And there is a building or a business, industrial going on that project. They also sold lot eight (8)?

Mr. Leming: Yes

Mr. Ingalls: And there is now a building on that. If he had gone on you would've seen all of the buildings on the other site that are there now. So of all the land included in the subdivision plat, if you want to narrow it to that, they did what they were supposed to do.

Mr. Leming: Right.

Mr. Ingalls: They did some work on the road, they sold a lot to somebody and now you're left with this one lot.

Mr. Leming: Right.

Mr. Ingalls: So this is all you got left of your project and now the County says you cannot develop on that like the rest of them.

Mr. Leming: Right because it's not a specific project, which is very circular in my view. Beyond that I would also emphasize that this is not only consistent with the 2004 preliminary final plat, it is also completely concept with a vision for the industrial park that we start seeing with the preliminary plan in 1989 and the construction plan to follow that. There is nothing at all inconsistent with what they've done with their three lots from what was originally envisioned under those plans. The vesting paradigm could be put back up to that point to. The evidence on the expenditures was not until they got into the picture.

Mr. Ingalls: Based on the other vesting case that you spoke a little bit about, it's not the same but kind of the same.

Mr. Leming: Dogwood, that is what it was.

Mr. Ingalls: Once you have a preliminary done and approved, you're vested.

Mr. Leming: That's correct.

Mr. Ingalls: Now, there may be some talking about the five-year deal and some of that business in there. I can almost understand it better as a residential subdivision because I can think that a residential subdivision developer goes and gets a preliminary plan approved. He may get one section approved, one section could be five lots or so and then he has a big parcel of land that he has a preliminary showing another hundred lots on, the County can't come in and rezone that different than what he had to start with because that land is vested.

Mr. Leming: That's correct. And this is not unlike a subdivision...

Mr. Ingalls: It is a subdivision.

Mr. Leming: Yes, it is. Not unlike a residential subdivision because it is still a subdivision unlike some industrial and commercial development or you really don't have the visual lots. This is very much like a subdivision where it's divided up and goes to final plat.

Mr. Gibbons: Any other questions? Ray, go ahead.

Mr. Davis: I would like to hear what Mr. McRoberts has to say about meeting the specific project.

Mr. Gibbons: Well, I'll go pick that up but I would like to get Rachel on this test; what was your determination? Then we will get the learned attorney out of Richmond.

Ms. Hudson: That is what was in my staff report, what I wrote in a staff report. What is your question?

Mr. Gibbons: There is a litmus test on what you're supposed to do. You basing your determination on the term project, is that correct?

Ms. Hudson: I was basing my determination on the 15.2.2307.

Mr. Gibbons: Okay.

Ms. Hudson: The different prongs, which the first one was, I might have to refer back to my staff report I'm sorry. I will go back to my determination. The division and dedication plat

approved February 19, 2004, which created the lot 38-83H was a significant government on and remains in effect.

Mr. Gibbons: Okay, so you agree on what the defendant is saying?

Ms. Hudson: He is agreeing with what the Zoning Administrator has said.

Mr. Leming: I am not the defendant.

Mr. Gibbons: The appellate, sorry. So you both agree on that?

Ms. Hudson: Yes.

Mr. Gibbons: Okay, next point?

Ms. Hudson: The next point was substantial expenditures associated with the erosion and sediment design for the existing road and the turnaround as well as the engineering for the subject lot. I guess, what you might say is you don't agree on the determination, I am saying with concurrence of the County Attorney that there was not pursuit of a specific project plan of development for specific use of the property.

Mr. Gibbons: So was a preliminary plan filed? Did you accept that?

Ms. Hudson: I'm going to defer to Mr. McRoberts because these are legal questions and I think Mr. McRoberts...

Mr. Gibbons: Wait a minute, I'll get back the legal thing, was their preliminary plan filed?

Ms. Hudson: There was a preliminary plan filed. I do not believe that was an affirmative governmental act.

Mr. Gibbons: No, no, no, we are just asking, was their preliminary plan filed?

Ms. Hudson: Yes, there was a preliminary plan filed.

Mr. Gibbons: Okay so they did do that?

Ms. Hudson: They did but, I don't believe that that was an affirmative government act.

Mr. Gibbons: We will leave it up to Andrew to say in a minute but you did get it. So in other words, what he's saying, the four things you base it on, you have all four?

Ms. Hudson: They have the significant government act, which was their subdivision plat that was approved in 2004, they had substantial expenditures and erosion and sediment work that they did.

Mr. Gibbons: And the preliminary plan...

Ms. Hudson: No, I'm not saying that the preliminary plan was one of those prongs.

Mr. Gibbons: Did you accept a preliminary plan?

Ms. Hudson: I did not accept a preliminary plan.

Mr. Gibbons: Who would do that?

Ms. Hudson: There was a preliminary plan that was approved in 1989.

Mr. Gibbons: Okay, thank you.

Mr. Ingalls: Can I ask Rachel a question?

Mr. Gibbons: Go Ahead.

Mr. Ingalls: I guess the question in my mind is when you looked at it, did you look at it as only a project on lot eleven?

Ms. Hudson: Yes.

Mr. Ingalls: You did not look at it as Wyche Industrial Park?

Ms. Hudson: No.

Mr. Ingalls: If you were to look at the project being Wyche Industrial Park would you change your opinion?

Ms. Hudson: I am not sure about that.

Mr. Ingalls: Okay.

Dr. Larson: Mr. Chairman, before we get started with the legal advice can I ask Ms. Hudson a question?

Mr. Gibbons: You sure can.

Dr. Larson: Rachel, you said what they submitted the plat and was a significant governmental act, which everyone seems to agree with. He said there was a preliminary plan submitted back in 1989, was that for a specific use?

Ms. Hudson: I think you've received a copy of that in your report. I pulled it out.

Dr. Larson: Where I am having a little difficulty Mr. Chairman is the first prong set significant affirmative governmental act, which we heard many times, but it says allowing the development for specific project. So it does not say the act itself is the specific project, it says the act allows the development of a specific project. There is still the specific project issue I think in the air. That is what I'm trying to track down, if this was specific enough.

Ms. Hudson: This preliminary plan states it was a preliminary plan for the Wyche Industrial Park.

Dr. Larson: Does that plan show any development on lot ten?

Ms. Hudson: It indicates lot ten, yes. Lot eight, nine, ten and eleven.

Dr. Larson: Does it show anything being done with lot ten?

Ms. Hudson: No.

Dr. Larson: Thank you.

Mr. Gibbons: Okay, Andrew you have been asked by Mr. Davis to comment.

Mr. McRoberts: Well it's very interesting and I agree with Mr. Leming on several points, vested rights is very complex and I will say that even fairly experienced counsel can go awry in these areas and I feel for you all as the Board of Zoning Appeals members and I particularly feel for the alternate who was sitting here for the first time and hearing her first case. Let me tell you how I would analyze this thing without going into a lot of detail about how the County Attorney or the Zoning Administrator may analyze it. I believe certainly when this thing came to you, it is now before you for determination and that includes analysis of all of the legal and factual issues. In this case, certainly you start with a three prong analysis; the issue is, is there significant affirmative governmental act allowing the development of a specific project but to really back up one step and that is what changed that triggered the claim for vested rights. In this case, the Stafford Board of Supervisors rezoned the property from M-1 to B-3, I think that's important, keep that in mind. Then when you get into the three prong analysis, then the issue becomes is there a significant affirmative governmental act allowing the development of a specific project. This is where I agree with Mr. Leming, when you talk approval of the final subdivision plat that is one of those things that is deemed to be a significant affirmative governmental act in the

statute. I'm not sure you get very far with the analysis and Zoning Administrator's determination that says that therefore this is not specific enough a project. How I come about it, is I say okay, let's assume there is a significant affirmative governmental act allowing the development of a specific project that you get into some factual issues that are before the BZA and that is was their diligent pursuit, was their reliance, was there substantial sums spent, you have heard evidence on that. You can make your determination on this factual issue as to whether or not substantial sums were spent, diligent pursuit was made etc. The significant affirmative governmental act that is claimed here is the 2004 final subdivision plat. There are several reasons for that, one is certainly the reason Mr. Leming pointed out. He has got a very clear expenditure numbers for that, he has evidence for that. It is certainly a lot more recent and would avoid some of the due diligence problems that Heather mentioned. If you're talking about 1975 or 1989, you have a serious due diligence issue but as to 2004, depending on how you view diligence pursuit that is less of an issue. This really turns in my mind upon, let's assume for the purposes of argument that there is a significant affirmative governmental act, there is reliance, there is substantial sums and everything and 15.2-2307; the issue then becomes what rights vest and that is something you will not find in the statute anywhere and that something that is has troubled the land-use bar ever since vested rights existed. There are many folks in the development bar that claimed when you vested rights you vested a snapshot in time; that when you vested rights you vested rights in, I think Mr. Leming may have used this word, everything that the law would allow this point in time. So you take a snapshot of the zoning ordinance in whatever allowed you've got vested in that. That was the argument. The problem for the applicant here is the Supreme Court has rejected that, the Supreme Court has rejected the snapshot in time theory, that is the theory that developers were arguing in the Hale versus Blacksburg Board of Zoning Appeals case that was decided in February 2009 about a year ago. I wrote the Amicus Brief on behalf of the local government folks in that case, I'm very familiar with the case. The developers were arguing in that case but had proffered rezoning that limited density and limited use and therefore they were vested. The Supreme Court went through all those things and determined that in fact these people were not vested as to the things that were not included in the significant affirmative governmental act. In other words, if these applicants were coming before the Blacksburg Board of Zoning Appeals and said that I invested in my density, they actually limited residential density, if for example of the change that Blacksburg had made had changed their residential density, then the Supreme Court said that they might very well be vested in that. That's not the issue in this case, the Supreme Court said, what the issue is in the Blacksburg BZA case is the change in the law was the Blacksburg town council has adopted a requirement for Conditional Use Permit for a large square footage retail operations, big box and the proffered rezoning on which the significant affirmative governmental act on which the applicant was relying was a proffered limitation of residential, which had nothing to do with the big-box Conditional Use Permit requirement. The Supreme Court rejected the snapshot in time and I will read you what the Supreme Court said the rule ought to be, the Supreme Court said in short "when vested rights accrue to a land owner as a result of the significant affirmative governmental act, the rights that the vest", and again this is the issue that is not in the statute anymore, it is only really in the case law. "The rights that vest are only those that the government affirmatively acts upon and the

evidence to support the claim to those rights must be clear, expressed and unambiguous”, it goes on and that's the rule. It goes on to apply the rule again, in this case they were talking about a proffered rezoning in which they had a limitation of density was their argument. The Supreme Court said “we do not agree with the broader premise that a landowner who is the beneficiary of a significant affirmative governmental act as the result of a proffer limiting density on specific category of use”, in that case residential, “is thereby entitled to claim a vested right use to every use of the land that was permissible at the time of the act without regard to whether the proffer restricting density related to that limitation on density”, in other words, that's a rejection on the snapshot in time argument for developers were making there. They did go on to say that "the vested rights that clearly would accrue under that circumstance would be a right to use the property for the specific use in up to the density that that particular proffer i.e. that significant affirmative governmental act touched upon” and then it goes on, they said "the developers here were not the beneficiaries of a significant affirmative governmental act based upon the acceptance of proffers that specified retail use as the particular use for which they subsequently sought to establish vested rights”. I believe that based upon the Supreme Court case that the real issue that this case turns on here tonight is not whether there is a significant affirmative governmental act frankly or not; the issue is even if it were a significant affirmative governmental act and we could see every point that Mr. Leming is argued here tonight, he still does not get the right to develop as an M-1 because a significant affirmative governmental act that he is relying on upon is the 2004 subdivision plat, not use. It does not specify use and I think Dr. Larson pointed out that the plat itself did not specify use and did not show any particular use on it. It did say industrial park but I can call my house 7-11 but that does not make it a retail use. I think the issue really comes down to what the Hale case said and the rejection of the snapshot theory and whether this significant affirmative governmental act actually gets to a preservation of the property owner's right to use an M-1 use. I would be glad to answer any questions.

Mr. Gibbons: Any questions?

Mr. Ingalls: I guess I have maybe a different view of the subdivision plat. The subdivision plat is a plat of industrial land, I couldn't build a house on it.

Mr. McRoberts: Does the plat limit that in any way?

Mr. Ingalls: Does it limit what in any way?

Mr. McRoberts: The subdivision plat? My perspective is if let's say that the Stafford Board of Supervisors instead of rezoning it to B-3 had of the zones it to R-1.

Mr. Ingalls: Okay.

Mr. McRoberts: Silly maybe but let's assume for the purpose of argument that they do that. It could be residential subdivision.

Mr. Ingalls: The plat is, no it couldn't, it does not meet the residential subdivision. But that does not have a state road in front of it which the County requires for residential subdivision. Venture Drive is not a state road, was not dedicated to the public, it is an easement a private easement. Private easements in Stafford County are only allowed in commercial and industrial uses.

Mr. McRoberts: Okay, but that really doesn't change the analysis. The fact is the approval was in approval of subdivision of land on a road. That significant affirmative governmental act does not go to the use of the property.

Mr. Ingalls: The plat does indicate that it was M-1.

Mr. McRoberts: It was at the time.

Mr. Ingalls: It was. Two out of the three lots have already been used for industrial and now you say this is not as industrial subdivision and I can't continue to use it as an industrial subdivision.

Mr. McRoberts: I think that the properties are already developed as industrial are nonconforming uses and may continue as such.

Mr. Ingalls: Those people are in trouble, that is a whole different issue.

Mr. McRoberts: I guess what I'm saying is, given the ruling in the Hale case rejecting the snapshot in time theory that I really believe that the rights that could vest possibly is limited to the four corners of the plat and that it was not approval of any specific use, it wasn't approval of a right to subdivide the land in that configuration.

Mr. Ingalls: I would have to argue that it was maybe different because there are different rules for industrial subdivisions over any other subdivisions. We all know the term subdivision has become so loose now that dividing 500 acres into two 250 acres is a subdivision. The counties word subdivision have a little different connotation to it. The County would not allow this is a residential subdivision. It had to be an industrial or commercial subdivision.

Mr. McRoberts: Okay, well now it's a commercial subdivision.

Mr. Ackermann: Could it be a B-3?

Mr. Ingalls: It could have been but was zoned as M-1.

Mr. Ackermann: Yeah but if we apply this argument, the property as it is could have fit under B-3.

Mr. Ingalls: Right, it was not...

Mr. Gibbons: Well, it depends on the road designed for that amount of traffic.

Mr. Ackermann: Do we have an industrial park defined in the Zoning Ordinance? I was trying to find it and I did not see it.

Mr. Ingalls: I think there is a definition of an industrial park in there. I would agree about the snapshot in time Andrew, I don't agree with that part of what he said because there are rules and regulations that are changing constantly that will apply that did not apply in... It depends on what you use whether it's 1975, 1989 or 2004 or tomorrow, they are changing constantly so I guess at that part I do agree with you that it is not a total snapshot in time. I have some feeling that a developer would be allowed to finish his project as he laid it out, as he envisioned it. Like I said, the three prongs to the stool are there, I just can't see why all of a sudden we can now say that they are not vested.

Mrs. Musante: Mr. Gibbons, would like me to read the definition of industrial park?

Mr. Gibbons: Yes please, by all means.

Mrs. Musante: "Industrial Park: a tract of land which has been planned, developed and operated as an integrated facility for a number of individual and industrial uses with special attention to parking, circulation, utility needs, aesthetics and compatibility".

Mr. Ingalls: It sounds like Wyche Industrial Park.

Mr. Gibbons: Any other questions? Doctor, do you have any?

Dr. Larson: Mr. Chairman, it boils down to, in my view, what you define as what we in the testing business call the system. If you look at the whole plat as industrial park I think Mr. Ingalls is correct; if you look at individual plots and what has been done with them I think the County is correct. I'm not sure which way is correct. Mr. Ingalls made an assertion earlier that I would like to ask about, maybe the County can answer this question, the staff. I think he said that if a residential developer bought a tract of land and did not, what were the words you used?

Mr. Ingalls: He had a preliminary and developed half of it.

Dr. Larson: And had not developed the other part and there have been a zoning change in that area, this is all hypothetical because I really can't picture this happening, would this be the same situation, would the developer... Let's say this one from residential to industrial, hypothetically?

Ms. Hudson: I don't remember what the time limit is on the subdivision plat. Are there times in the subdivision ordinance?

Mr. Ingalls: Vesting does not talk about time in terms of, due diligence to move forward all the time.

Mr. McRoberts: I think what the Zoning Administrator's talking about is the time during which you have to proceed upon a preliminary plat approval and there are time limits in the statute for that. Otherwise, it expires.

Mr. Ingalls: If I do a preliminary I have five years by state statutes.

Mr. McRoberts: I think at this time it might've been three years.

Mr. Ingalls: If I do a final plat that gives me something else I believe.

Mr. McRoberts: In this case they went to record.

Mr. Ingalls: Once a final plat goes to record then you have other vesting rights.

Mr. Gibbons: But Andrew, what was presented tonight and I know you are talking about the Hale case but what was presented tonight is a litmus test and one is: was there a significant government act that occurred in 2004, with her preliminary plan filed. Melody just read the industrial park definition and the thing that really bothers me is that we have a plat here that was not designed as a mixed-use. You can see by the road, the Utilities, and I know the board down zoning the area recently to B-3 but you can't shoehorn a plat that was made for what the area was developed for. You could not put it B-3 in here and widen the roads, would not support the traffic. I don't know if the water and sewer is significant to support an office park. Rachel kept saying that it was not project specific but if the sign and the plat and everything has been here since back in the 1970s, it was designed to be an industrial park. If you took the whole plat out and it was just raw land that had not plated I could see where we've been down zoned to something else but to put one plat in the mix of others that have already been developed. It is like use and contiguous to like use property, the same way as zoned. In fact I am surprised he hasn't come back and rezoned this one piece back to M-1 because it was contiguous to the industrial. It's a nice buzzword, snapshot in time because we did on the computer industry and in Oracle and a few others and nobody has been successful with a snapshot of a computer and move it across the world and the data stays up to date so I love the snapshot. What I'm concerned about is that it's in an industrial area that was designed and plated for industrial, it was not plated for B-3. There was no intention of putting office park in that area.

Mr. McRoberts: I guess to your point this is perhaps something that should go to the legislative judgment of the Stafford County Board of Supervisors but in this case the BZA has before it is the fact that the zoning has changed on this property and unless vested then B-3 are the uses permitted. Then the question is, is there a significant affirmative governmental act that was relied

upon and substantial sums and diligent pursuit that was a approval of that specific project. In this case, the project is delineated by the 2004 approval. While it does say industrial park on it, it does not actually specify use, the governmental approval specified it had to be a subdivision in that configuration.

Mr. Gibbons: But I thought it had M-1 on the plat.

Mr. McRoberts: That is the current zoning on the plat but the approval was not of the current zoning.

Mr. Gibbons: In 2004?

Mr. McRoberts: That was not rezoning to that zoning category. That was the existing.

Mr. Gibbons: The use says it is in an M-1 district so the use is assumed to be industrial.

Mr. McRoberts: That is correct but you cannot vest rights in an existing zoning category and certainly Mr. Leming has not argued that here tonight.

Mr. Ingalls: Actually, Mr. Chairman if I can comment?

Mr. Gibbons: Sure.

Mr. Ingalls: In the undated William Shelley letter his last paragraph says "at this point no site plans will be approved and no permits will be issued for any further developments", but then his next sentence is "I hope that this issue may be resolved as soon as possible so that the remainder of the industrial park can be developed as proposed without hardship". He recognized, he being William Shelley, the Director of Planning and whenever you said that letter was written, the county recognized that that was an industrial park.

Mr. McRoberts: That was the zoning at the time.

Mr. Ingalls: Right.

Mr. McRoberts: And that is not a significant affirmative governmental act for the applicant is citing. It is previous to that.

Mr. Gibbons: Gail did you want to say something?

Mr. McRoberts: I have given you my advice and if you all disagree then that's fine.

Mr. Gibbons: Andrew, I would like to have you write a book on that snapshot, I like that.

Mr. McRoberts: Well I did, it's called the Amicus Brief on behalf of the local government attorneys of Virginia, the Virginia Municipal League and the Association of Counties. It is on file downtown.

Mr. Ackermann: Would you say that all plots in that subdivision would be M-1?

Mr. Ingalls: No. I am not saying that.

Mr. Ackermann: Under what conditions would it be possible for the county to make them B-3?

Mr. Ingalls: Well, they have made them B-3, those that are developed are now B-3 and I'm not sure how to get out of that box but that's for someone else to figure out. My non-legal opinion says that the remaining lands of this industrial park, we could have the same case before us on that land. They will come to us and say this was the road that went onto my land, and my industrial park in there is that I had a preliminary that has been developed and that land is also vested for zoning.

Mr. Ackermann: Another question, maybe it's of the applicant. Could you tell me, if I wanted to buy that plot, how much it would cost?

Mr. Leming: Lot eleven? Can you tell me what you sold the other ones for?

Ms. Blanton: Not off the top of my head.

Mr. Ackermann: Just ballpark?

Mr. Leming: \$200,000, somewhere in that area.

Mr. Ackermann: Thank you.

Mr. Leming: Mr. Chairman, there is something that's on the plat that might help, this is the 1989 preliminary subdivision plat. The first note on the plat does significantly limit what can be done here "it says the street within this proposed industrial subdivision shall be privately maintained by the individual lot owners, design specifications shall be presented at individual site plan submissions", that also anticipates the industrial subdivision and a private road. In my view the issue is simply whether or not the property is vested and whether it meets the three prongs of the test. If there is an issue later on as to what they're for specifically vested for, that would come up when a proposed use comes in for the property, when the site plan is submitted. There may be an argument by the County that this is not an industrial use or industrial park. The issue here, the three prongs of the test, does this particular property meet that? And what the statute says is it's not that this particular significant affirmative governmental act must demonstrate, or show or be indicative of the project, it says it must be in furtherance of a specific project.

Mr. Gibbons: Okay, I will open it up to the public. Is there anybody on my right, there's only two people out there, that wants to speak for or against this? I'll bring this back to the board. Mr. Leming I assume your last comments were your rebuttal.

Mr. Leming: Did I use my three minutes? Let me just sum up by saying, I think that what is covered in the Hale case is an entirely separate kettle of fish, it deals with a different prong of the vesting test. The ones that I indicated to you earlier which have other language than what we are talking about here. Here you have a specific project that has remained dead on from the time of the preliminary plan to the present, that's the project is being furthered. The final subdivision plat is a significant governmental act in furtherance of that particular project. That I think is the analysis, if there is what's called a bright line test or the snapshot approach later on, that would be applied to a particular use that was proposed at the time that this parcel is developed but that was not part of the county's determination, none of this was. The county says it's not a specific project under prong one of the vesting test, that is the issue, is a specific project under prong number one? Thank you.

Mr. Gibbons: Thank you and I will bring it back to the Board.

Mr. Ackermann: Can I ask Rachel one question?

Mr. Gibbons: Sure.

Mr. Ackermann: Rachel, do you know or maybe somebody else knows, when the county decided to make this B-3, was that based on a recommendation from the Planning Commission? Do you know?

Ms. Hudson: I have no idea.

Mr. Gibbons: That was board driven.

Mr. Ackermann: It would be instructive for me to know why.

Mr. Ingalls: It says "whereas the board has carefully considered the recommendation of the Planning Commission, staff and testimony of the public". They considered it, it does not say that they recommended it.

Mr. Ackermann: I'm not familiar with these types of rezonings, do we know is this language that we would typically see in a resolution like this? Does it say "the board has determined that the requested zoning is compatible with the surrounding land uses and zoning, the board finds public necessity, convenience" so on and so on.

Mr. Ingalls: It probably does that for some legal reason which probably Andrew knows about.

Mr. Ackermann: Is it the case in fact?

Mr. McRoberts: I certainly think that the Stafford Board of Supervisors seriously considered everything that went before but I will also say that certainly that suggests that its legislative judgment was reasonable and for that it is a good reason to include it.

Mr. Gibbons: Okay we have it back at the board.

Dr. Larson: Mr. Chairman, could I ask Mr. Leming one more question?

Mr. Gibbons: Sure.

Dr. Larson: Mr. Leming, do you know what the specific use will be for the lot in question?

Mr. Leming: Another industrial building.

Dr. Larson: Another industrial building?

Mr. Leming: If you take a look at the M-1 portion of the code first of all, most of the heavy industrial uses require M-2 zoning and/or conditional use permit. Industrial parks, flex space, industrial offices those are the things that are most compatible with just the straight B-1 zoning so that is about all they can do under the current zoning ordinance with the M-1 use. Everything else has the contiguous uses on either side and across the street; if you've been down the road there is a trucking place on one side, one, two, three industrial uses on the other side, one further up the street and they are all industrial park uses.

Dr. Larson: And you indicated that the use for this lot is part of a preconceived plan, which has been in place for a while, I think you sort of implied that. Could you walk us through briefly the history of what went in where and at what time?

Mr. Leming: Okay, the uses that are out there, first of all we start with the M-1 zoning that goes all the way back to 1975. Nothing happens, the property was owned by a surveyor in the area at that time by the name of Calvin Burns, owned a lot of property in the area. It was originally set up by its configuration as an industrial park, that is consistent with the size of the lots. Then in 1989, you have the first actual plan moving the development along, that's the preliminary subdivision plan that we read from there.

Dr. Larson: I guess I'm more interested in the actual construction. When did it occur?

Mr. Leming: We are approaching that. The preliminary plan 1989 is the first time that you see the term Wyche Industrial Park that appears on a plan for the first time. The original zoning is

then divided into lots that are consistent with industrial uses, flex space, the kinds of things that happen there. Now, if you look at aerials that I handed out at the beginning? If you look at aerials here, Venture Drive is the road at issue here. Everything better than industrial use but the most historic use of the property is the trucking center, it is fleet parking and storage. It used up three of the parcels for the industrial park and Mr. Gibbons may have a better idea when they originally came in because but they've been there quite a substantial amount of time and had expanded onto other parcels that were part of the original industrial park. There is the other buildings that have been developed, this area over here was an outlot under the original plan and this was developed industrially, that is Sikes, which had been there a substantial period of time. As far as a specific date is concerned, sometime in the early 1990's. The Tote Inc. is the parcel rate here and they sell containers, haulers and trailers and things like that. That one is a little bit newer but I don't think that that was there by the time you all did anything with your parcels. This building here is the building that had been constructed, this is Hawkins Glass Wholesalers, and this big building was the one that was constructed on the parcel immediately adjacent to the one that we're talking about tonight. Now the undeveloped parcel over here, this has also become part of Sikes this was also one of the ones originally sold by Chesapeake Stafford Associates. You don't see anything from this aerial, that is the newest development, obviously the one parcel ten over here would have been built after 2004. I assume you sold it sometime after 2004 and that was probably one of the newer ones on the property. Some of them, McLean trucking goes back to the early 1990s and has grown since then; early 1990s for Sikes here and they've expanded recently onto one of their parcels; the other two pieces were probably sometime in 2005 or 2006.

Mr. Gibbons: The Sikes Automotive was a relocation out of Alexandria to here.

Mr. Leming: Now, the land, is actually another one over here. This is called Owens. I don't know what the date of that one is but I assume that occurred as McLean expanded but that is an industrial use also, light industrial. So those are the ones that have been developed, actually if you count up all the lots that have something built on them it is six of the lots. As these things go keep in mind some subdivisions take 15 years to build out. Over the last couple of decades these are the uses that have actually been put on the ground.

Dr. Larson: Thank you.

Mr. Gibbons: Any other questions?

Mr. Ackermann: Yes Mr. Chairman, an issue that concerns me is that I could see if we approve the appeal that in some way we're saying that it doesn't matter what the Board of Supervisors said about this property, we think they should be M-1. I am not entirely comfortable about making the decision quickly or would be happy to hear from other members of the board to see about taking that approach of somehow contradicting what the Board of Supervisors thought was a reasonable thing to do.

Mrs. Stefl: Maybe being the newest one up here I'm having a tough time understanding, I thought what we're being asked today is whether or not the owner is vested, we're not getting into whether B-1, B-3 matters. Our issue is not whether or not we feel that the owner has vesting rights. Is that correct Mr. Chairman?

Mr. Gibbons: Yes.

Mrs. Stefl: Alright, thank you.

Mr. Ackermann: I guess the way I see it is that if we agree that the appellant has vested rights then that can be changed by the Board of Supervisors, but they can't change the zoning in that area. Just my concern.

Mr. Gibbons: I think you bring up a good point. This point is one part of this whole area has been down zoned and it was board directed. They sent it back to the Planning Commission and at that time many boards were worrying about when we down zone something what effect it has on the analysis of it. It looks like in this one area that there might be one or two more parcels like that with the intent that the whole parcel of the industrial; not questioning the board's ability to down zone area to make it the courthouse area but maybe this one area can be looked at again by the board to see if you should leave it as M-1 until the completion of this one thing and maybe send it back and asked the board to look at it. They're not taking anything away from the board, you're asking the board that this is the parcel in between contiguous uses, the road was not designed for the B-3 zoning and would you take another look at this. If the board who wish to hear that maybe that's the proper avenue for the applicant to take but I'm not against asking the board for guidance. This is the first case that we've had for down zoning and we're looking at a parcel that is 85% already heavy commercial, it is not designed for office space. What do you think Mr. Ingalls?

Mr. Ingalls: I almost feel like we have the case before us now and that's not to say that we'll make some decisions. Say that we have this problem area and we would like for you to take a look at it, I think part of our due diligence on serving here is when problems arise, we should notify the Board of Supervisors. We've seen one problem already, there could be others here that could be coming about with this down zoning. That is probably natural. We have a large down zoning of almost 400 some acres, you probably do have some problem areas that need to be looked at. Just as a sidebar, I was looking at the application for the preliminary plan, the county's application asked for the proposed use for subdivision and it says on the preliminary plan application, the applicant wrote industrial. I don't have the application for the final four lot plat or three lot plat and I would be willing to guarantee that that question is probably on the application.

Mr. Leming: That may be on the application.

Mr. Ingalls: I was not able to find the application for the final one that was submitted, Bagby, Caldwell plat. I wonder if it said that the purpose of the proposed use of the subdivision?

Mr. McRoberts: Well, of course they would that was the purpose of the rezoning. I don't think that's relevant really.

Mr. Ingalls: It is industrial, it does not say office.

Dr. Larson: Because it was not done that way. It was not a specific use.

Mr. Ingalls: Why would they put on the application because the question right above that one is what's the zoning and it says proposed use.

Dr. Larson: Maybe they want more information of the specific proposed use.

Mr. Gibbons: Any suggestions? Maybe I'm making an unusual request, but I'm not adverse to going back and asking the board if they would reconsider this portion of it because of this problem or does it reaffirm that it has to be this. We've been very fortunate with the board that we've sent quite a few things back and they've been very positive.

Dr. Larson: I think that's reasonable but I think we probably owe the applicant a decision but it may be a difficult decision but I think we owe them that.

Mr. Gibbons: Do you mind if I asked the applicant if he had a problem?

Dr. Larson: No.

Mr. Gibbons: Would you have a problem with that?

Mr. Leming: Let me ask my client.

Mr. McRoberts: That is what the statute says. Certainly we can ask the applicant to defer.

Mr. Gibbons: He can request a deferral.

Mr. Leming: We have several options, Number one, if the landowner decides to go forward and request a vesting determination it is absolutely clear that we bypassed the Zoning Administrator and the BZA. That was reaffirmed in another case last term, I'm sure Mr. McRoberts is familiar with.

Mr. McRoberts: Right out of Stafford County.

Mr. Leming: That's right, so we do have that option of the landowner, if this thing gets bogged down. I don't have an objection to asking the Board for some clarification here or at least to get back to you all with some intent as to whether or not they would on their own initiative rezoning or change the zoning back on the specific parcel. What I would be concerned about is the time involved there. Obviously zoning has to go through a couple of public hearings. Staff would have to analyze it so we are probably talking about and that would be after the board says they want to do it, so we are talking about at least a six-month process. What may be helpful in your quest to the Board would be to ask them to indicate on fairly short time period as to whether or not they would defer this matter back to the Planning Commission for zoning change on this particular property. If the board indicates that they're willing to do that, that is a pretty good signal that the six month process is worth pursuing. If they don't do that and that would be the end of the process anyway. Maybe they could at least get back to you.

Mr. Gibbons: If that would be the desire of this board, would you then defer that time since we have the sixty day clock running?

Mr. Leming: Sure, we would concur with a deferral at this point. I want to stop short of saying that I'm requesting it.

Mr. Ingalls: Would we set a timeframe?

Mr. Gibbons: Sure.

Mr. McRoberts: Is this a general deferral? I guess I would ask Mr. Leming, obviously the statute says what it says, are you basically waiving the applicant's right to insist upon a time limitation of the statute?

Mr. Leming: Well, the time limitation to sixty days from your hearing. So the board would get back to you at your June meeting, you would still be within your sixty day window.

Mr. McRoberts: I thought it was sixty days from the application but let me double check.

Mr. Leming: Check and see. Let me suggest this if I may, I'm concerned about the time involved here and from my standpoint as you've heard there is really not much question to whether or not this property is vested. The issue is how do we get the matter resolved so they can proceed with the project that they originally envisioned. How about if I agree to a deferral to the June meeting. I'll come back at the June meeting. If it looks like there's some progress to be made on the Board and hopefully they would have reported back to you by that time. If it doesn't look like it's going anywhere then I would ask for decision still within the sixty days, assuming it says sixty days from the date of the hearing. You might want to check the bylaws and see if it says anything about it too.

Mr. Gibbons: Let's send the request to the Board and ask them to take a look at it.

Mr. McRoberts: And the public hearing has been closed on this Mr. Chairman?

Mr. Ingalls: We closed the public hearing.

Mr. Gibbons: We closed it when he did the rebuttal and we are just asking questions. I have already closed it.

Mr. McRoberts: I just wanted to clarify.

Mr. Gibbons: I need a motion.

MOTION:

Mr. Ackermann: I move that the chairman take our concerns to the Board of Supervisors and report back to us at the June meeting.

Mr. Ingalls: Second, and defer the case as well.

Mr. Ackermann: And defer the case as well until our June meeting.

Mr. Gibbons: Okay, all in favor say aye.

Mr. Ackermann: Aye.

Mr. Davis: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mrs. Stefl: Aye.

Mr. Gibbons: Aye. All opposed? It passes 6-0.

VOTE:

The motion to defer this item until the June meeting passed 6-0.

Mr. Ackermann – Yes

Mr. Apicella – Absent

Mr. Davis – Yes
Mr. Gibbons – Yes
Mr. Hudson – Absent
Mr. Ingalls – Yes
Dr. Larson – Yes
Mr. Ortiz – Absent
Mrs. Stefl – Yes
Mr. Gibbons: Okay.

Mr. Ackermann: Could I also ask legal counsel, notice that you made when you read us the case in Blacksburg. Could you write it up and send it to us?

Mr. McRoberts: I will do that, I will tell you that I was put on notice today by the County Attorney that the money is just about out. When I arrived here in August, I told you my time and money was limited so I may not appear before you in June. I may not even be here in May, it depends on how much this month costs and whether it exceeds the amount because this Board of Supervisors appropriated a certain amount level and certainly staff does not have the authority to spend over that.

Mr. Gibbons: But we will go back and ask the Chairman to reconsider the funding.

Mr. McRoberts: I will certainly be working hand-in-hand with the County Attorney on making sure that I can provide you service but I'm not able to exceed the appropriation.

Mr. Gibbons: But again, we work with the Board and we will go back and ask to make sure the funding is in place to get you through June.

Mr. McRoberts: Thank you. So in response to Mr. Ackermann's request I'd be glad to write that.

Mr. Ackermann: Thank you very much. I appreciate it.

Mr. Gibbons: Okay, next item.

1. **A10-2/1000064 - LEMING AND HEALY, P.C.** - Appeal of the Zoning Administrator's electronic mail dated March 18, 2010, regarding reconsideration of the January 14, 2010, vesting determination for Chesapeake-Stafford & Associates, LLC, Assessor's Parcel 38-83H, on Venture Drive in the Wyche Industrial Park.

Mr. Leming: Mr. Chairman, can I make a suggestion in an agenda item?

Mr. Gibbons: Yes.

Mr. Leming: Although, we would be happy to stay here, if the board decides that the property is vested, the second appeal is irrelevant.

Mr. Gibbons: Right.

Mr. Leming: So, what I would suggest is that you also defer that at least until such time that she knew whether you're going to make a determination to the vesting.

Mr. Gibbons: Well, let's move it to June because we know that's when the subject will come up again.

Mr. Leming: Okay.

Mr. Gibbons: We need a motion to defer A10-2/1000064 to the June meeting.

MOTION:

Mrs. Stefl: So moved.

Mr. Ackermann: Second

Mr. Gibbons: All in favor say aye.

Mr. Ackermann: Aye.

Mr. Davis: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mrs. Stefl: Aye.

Mr. Gibbons: Aye. All opposed? Okay that's good, thank you very much for coming and thank you Ms. Blanton.

VOTE:

The motion to defer this item until the June meeting passed 6-0.

Mr. Ackermann – Yes

Mr. Apicella – Absent

Mr. Davis – Yes

Mr. Gibbons – Yes

Mr. Hudson – Absent
Mr. Ingalls – Yes
Dr. Larson – Yes
Mr. Ortiz – Absent
Mrs. Stefl – Yes

UNFINISHED BUSINESS

Mr. Gibbons: Unfinished business, any unfinished business? Why don't I do the other two first and then we'll come back because I think we did have one. Aisha did a good job on this. Zoning Administrator's report?

ZONING ADMINISTRATOR REPORT

Ms. Hudson: Okay, you have two handouts of two different ordinances that are in draft form. One was proposed amendment to section 28-273(a), nonconforming structures, the first one I would like you to look at went to the Planning Commission on April 21st, that was to amend the county code regarding natural disasters or any other act of God regarding repairs of buildings and structures. That may go to the Board for approval or denial in June. The Planning Commission heard it last week and recommended its approval. The other one is O10-33. That is an ordinance to amend and reordain the same County Code Section 28-273(a), nonconforming structures. That is being sent down from the Board. They voted on it on the 20th of April and it's going to the Planning Commission for discussion next Wednesday and that has to do with deleting the special exception for increasing a nonconforming single-family dwelling.

Mr. Gibbons: Alright, anything else?

Ms. Hudson: I don't believe I have anything else. I will be bringing things to you regarding the General Assembly approvals as we start going through those I will keep you informed on that.

Mr. Gibbons: Is there going to be a June meeting Andrew, of the BZA and the Planning Commission like he did last year?

Mr. McRoberts: Oh, do you mean with the Virginia Association of Counties?

Mr. Gibbons: Right.

Mr. McRoberts: I'm not familiar with that event but if it had it in the past they will again.

Mr. Gibbons: It is done by Mr. Chandler.

McRoberts: I don't know.

Ms. Hudson: I think that is normally held in the fall.

Mr. McRoberts: Oh, you're right. He has the legal seminar in late May or June. I don't know the specifics.

Mr. Ingalls: Rachel, are there any pending suits out there that we are involved in? Do you know the status of any of them?

Ms. Hudson: At the Circuit Court?

Mr. Ingalls: Yes.

Ms. Hudson: There are two of them over there but I don't know the status. The HCS cemetery decision, we've not had anything come over for the writ to be filed and Norman Road Salvage Yard is over there.

Mr. Ingalls: Thank you.

Mr. Gibbons: I thought what the salvage yard for the Board of Supervisors appointed a committee to look into the situation. I thought Mr. Snellings chaired that.

Ms. Roberts: I believe Mr. Woodson and Mr. Snellings were looking into that and actually did have a site visit with Ms. Hudson and Mr. Neuhard.

Ms. Hudson: I've heard nothing since then. That was three weeks ago.

Mr. Gibbons: Thank you very much.

ADOPTION OF MINUTES

3. January 26, 2010

Mr. Gibbons: Adoption of minutes of January 26, 2010. Any corrections or deletions on these? All right, so made a motion for approval.

MOTION:

Mr. Davis: So moved.

Mr. Ackermann: Second.

Mr. Gibbons: All in favor say aye.

Mr. Ackermann: Aye.

Mr. Davis: Aye.

Mr. Ingalls: Abstain.

Dr. Larson: Aye.

Mrs. Stefl: Aye.

Mr. Gibbons: Aye. All opposed?

Mr. Ingalls: I abstain since I was not at that meeting.

Mr. McRoberts: Mr. Chairman, you wanted to know that date of the legal seminar?

Mr. Gibbons: Yes.

Mr. McRoberts: I have Monday, May 31st, which is Memorial Day believe it or not. I think it's been pointed out to Mr. Chandler that that was Memorial Day and many people may have other plans but to my knowledge Mr. Chandler has not changed the date.

Mr. Gibbons: Okay.

VOTE:

The motion to approve the January minutes 6-0.

Mr. Ackermann – Yes

Mr. Apicella – Absent

Mr. Davis – Yes

Mr. Gibbons – Yes

Mr. Hudson – Absent

Mr. Ingalls – Yes

Dr. Larson – Yes

Mr. Ortiz – Absent

Mrs. Stefl – Yes

OTHER BUSINESS

Mr. Gibbons: Other business? What we have is I want to welcome Heather, we have two appointed alternates. Heather is one and Stephen Apicella is the other and they will be here every

meeting. What we're trying to do is come up with a change to the bylaws. Aisha took all the comments that we had submitted and she put them in a document here for us, I would like to extend this one more month so everyone can take a look at this since we have a couple of new numbers, we will bring it up next month. Aisha I want to thank you very much for doing this and publicly I want to thank the two of you for the last meeting we had of moving people and making sure our citizens feel comfortable and treated the right way. That is impressive and we thank you very much. Anything else?

Mr. Ackermann: Mr. Chairman, I wanted to suggest yet another change to the bylaws that would allow for or give some the delineation about when we would receive materials. Something that would allow for interested parties to put appropriate information in the packet, that we could get with our packet. Also to notify folks, if they don't get it in by my particular date, like the stuff that we get from Mr. Leming all the time. If he could include it at a time so they can go in the packet then the County could distribute it and that would be the material that we would look at. I can send around some language on that and that would probably be part of 7-4, I think.

Mr. Gibbons: I think it's a good idea.

Mr. Ingalls: 7-4 seems to be unclear, at one time I think we had some concern that Mr. Leming and other people would come in here and give us a big packet on the night of the meeting. I'm sure Mr. Leming gave us what he gave us to pass out was the same thing that we all gotten three other times tonight to make sure that you had it to look at. There is no way that any of us could sit down tonight and read all that and comprehended it and still had our meeting here and get away with one case that we didn't vote on until after nine o'clock. At one time I thought that was in there because we didn't want to happen, we wanted to have it before we got to the meeting.

Mr. Ackermann: I think that's what I'm saying, if we give a deadline than of whenever staff puts the packets together, it would go with that and it doesn't necessarily have to be turned in with the application.

Mr. Davis: I think that any information that we should consider should be with the application, that's why it's called an application. All the backup material should be with it and many as 10 minutes to present any additional information. To get here and go over the application, almost verbatim sometimes, does not do anything for me. I did my homework and read the stuff, I take the time to do it and if I'm gonna come here and listen to it again and I'm wasting my time to read it home. I like the way the bylaws were written and I think people should be advised we would only consider information that was presented.

Mr. Ackermann: That is the point, could we allow for something to be put into the packet that was not necessarily part of the application. It could be folks that were in favor or oppose to an application as well.

Mr. Ingalls: Sometimes an applicant finds itself back up to the thirty day deadline for something like that trying to meet it and the only thing they can do is file an application to get it on the docket. You can have everything that you would like to have at that application.

Mr. Davis: So change it to forty-five days, sixty days or ninety days.

Mr. Ingalls: Change what?

Mr. Davis: The deadline for submitting an application. The deadline for appealing to the Zoning Administrator's decision, the state said that the applicant or whoever is agreed as thirty days? That is a state statute.

Mr. McRoberts: That's correct.

Mr. Davis: There is a reason for all these rules and regulations.

Mr. Ackermann: I guess what I was trying to get at was to provide a way for folks to give us additional information that they do not have with their application, that we could still get it in an orderly way.

Mr. Ingalls: Mr. Ackermann would like to have it with packet. Whatever deadline it takes for the County, the applicant gives any additional information to the County prior to them sending out the packets.

Mr. Ackermann: Yes, that is what I would like to see.

Mrs. Stefl: So only information we receive from the County could go under consideration?

Mr. Ackermann: No, people can still present materials at the meeting.

Mrs. Stefl: What would prevent an applicant from again giving again giving us a piece of paper for consideration?

Mr. Ackermann: They could, I think what Mr. Ingalls was saying was that if they gave it to us earlier than later consider it. Give it due consideration. People can still give us stuff and people are going to come in, particularly members of the public that often come in with information; so we would still get materials at the meeting to consider. There has to be some reason why he sends us that stuff, I guess he wants us to read it. Of course, it's his client's money but if they want us to read the stuff or consider it before we come to the meeting and we can do that. Just like the illusion that he made in his e-mail to me, Clark Leming made in his e-mail to me about will we read the staff report before you come to the meeting. I felt very comfortable reading anything in the packet. I will throw out some language and we could take shots at it and see.

Mr. Gibbons: Fair enough.

ADJOURNMENT

Mr. Gibbons: Anything else? Okay, we are adjourned, thank you very much.

With no further business the meeting was adjourned at 8:57 P.M.